FILE COPY

No. 517

IN THE

Supreme Court of the United States

October Term, 1958

WINNEBAGO TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
RADIO WISCONSIN, INC., and
GREATER ROCKFORD TELEVISION, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 258 F.2d 163, is printed as an appendix hereto. The basic decision of the Federal Communications Commission (R. 792-802) is reported at 22 FCC 356, and its decision denying rehearing (R. 869-873) at 23 FCC 53.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on July 2, 1958. By Order of the Chief Justice dated September 19, 1958, the time for filing a petition for a writ of certiorari was extended to

November 14, 1958, pending action by this Court on petitions for certiorari in Nos. 235 and 242 (Oct. Term, 1958). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether principles enunciated by this Court in the *Chenery* case were incorrectly applied by the court below—in a proceeding instituted by the Commission for the purpose of determining as *a factual matter* whether the deletion of a VHF channel allocated to a given market would result in more service rather than less service (47 U.S.C. Sec. 303(g)) and where a key vote in the Commission's subsequent 4-3 refusal to deintermix that market was predicated on an erroneous *legal* interpretation of 47 U.S.C. Sec. 307(b).

2. Whether a court is in a position to discharge its responsibility of determining whether basic policies which Congress has set forth in the governing statute are or are not being effectuated by the Commission, where the agency decision ignores relevant public interest considerations, where the conclusions do not rationally flow from the findings made, and where the result is patently and unexplainably inconsistent with the decisions of a different majority of the Commission in related proceedings decided the same day.

3. Whether this Court, in view of its actions vacating the judgments of the court below in related deintermixture cases (Nos. 235 and 242), should likewise vacate the instant judgment, inasmuch as these several proceedings were all instituted by the Commission on the same day (June 26, 1956), decided by the Commission the same day (March 1, 1957), and (by reason of their close legal and factual interrelationship) should be reconsidered by the Commission at one and the same time.

STATUTES INVOLVED

Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .
>
> Sec. 307 (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

Realizing that 12 channels were insufficient to provide a nationwide competitive television system, the Commission in its Sixth Report released April 14, 1952, added 70 ultra-high frequency channels (UHF channels 14 through 83) to the 12 very high frequency channels (VHF channels 2-13) theretofore utilized for television broadcast purposes.[1] The Commission further concluded in its Sixth Report, in assigning specific channels to designated communities (see 1 RR 53:606), that the VHF and UHF channels should be "intermixed" (i.e., that some VHF and some UHF channels should be assigned to each major market to the extent possible), on the premise that such an allocation system would compel the manu-

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[1] See Sixth Report of April 14, 1952, 1 Pike & Fisher, *Radio Regulation*, Pt. III, p. 91:664 (para. 197), hereinafter cited as — RR —.

facture of nothing but all-channel receivers and that the new UHF channels would thus become in due course "an integral part of a *single*, nationwide television service."[1]

Pursuant to the intermixture policy thus utilized in its Sixth Report, the Commission on April 14, 1952 allocated VHF Channel 13 and UHF Channel 39 to Rockford, Illinois for commercial use. In like fashion, the Commission allocated VHF Channel 3 and UHF Channels 27 and 33 to Madison, Wisconsin.[2] Madison is some 50 miles northwest of Rockford.

Petitioner, Winnebago Television Corporation, obtained a grant on UHF Channel 39 and has provided a UHF service to the Rockford area since April 29, 1953 (Station WTVO). Respondent Greater Rockford Television, Inc. obtained a grant on VHF Channel 13 on which it has provided a VHF service to the Rockford area since September 18, 1953 (Station WREX-TV). Early grants were similarly made on each of the three UHF channels allocated to Madison (Station WHA-TV on UHF Channel 21*, Station WKOW-TV on UHF Channel 27, and Station WMTV on UHF Channel 33).[3] Fortunately for the growth of UHF in this area, a grant of VHF Channel 3 in Madison to respondent Radio Wisconsin, Inc. was delayed until December 1955 by reason of the need for a comparative hearing on the two competing applications for that facility.

Long prior to the resolution of the Madison hearing for Channel 3 (10 RR 1224), it was becoming apparent to large segments of the television industry (with many

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[1] See Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 661-665 (paras. 189, 197, 200).

[2] In its Sixth Report the Commission also allocated UHF Channel 45* to Rockford and UHF Channel 21* to Madison for noncommercial educational use.

[3] Station WKOW-TV began operation June 30, 1953; Station WMTV on July 8, 1953; and Station WHA-TV on March 26, 1954.

markets still being flooded with VHF-only receivers) that the Commission's 1952 policy of intermixing UHF and VHF in the same area was a mistake—that UHF stations in the larger markets were folding upon the advent of a *second* VHF service and in the smaller markets on the advent of a *first* VHF service (R. 434-447).[1] It seemed apparent that if the United States was not to be limited to television on 12 rather than the 82 channels envisaged by the Sixth Report, a change in allocation concepts was necessary. It was urged that the removal of VHF channels from markets where UHF stations were providing competitive service and the utilization of the deleted VHF channels in other areas already so predominantly VHF that UHF stations could not obtain a foothold (i.e., a policy of "deintermixture") would result in substantially more competitive service throughout the United States and a more effective utilization of valuable spectrum space, in line with the mandatory requirements of Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)).[2]

After considerable prodding by Congress, and a number of "false starts",[3] the Commission finally concluded,

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[1] See the so-called Potter Hearings of May-June 1954 (Hearings on S. 3095, 83d Cong. 2d sess.), *passim*.

[2] See the so-called Plotkin and Jones Reports of February 1 and 12, 1955 (excerpted at R. 472-475).

[3] See Report and Order of November 10, 1955, 13 RR 1511; Memorandum Opinion and Order of November 10, 1955, 13 RR 1522, 1525; Notice of Proposed Rule Making, November 10, 1955 in Docket No. 11532, 20 Fed. Reg. 8501 (1955). It was the refusal of the Commission to hold VHF comparative grants in abeyance, while it was restudying its Sixth Report in the proceeding leading up to its *Second Report on Deintermixture*, which gave rise to the so-called "first round" of deintermixture appeals in the court below: See *Coastal Bend Television Co.* v. *FCC*, 97 U.S. App. D.C. 339, 231 F.2d 498 (1956), *ibid*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Greylock Broadcasting Co.* v. *United States*, 97 U.S.

in its *Second Report on Deintermixture* of June 26, 1956 (13 RR 1571), that intermixture was not producing an integrated television system, that VHF in some instances was thwarting opportunities for effective competition among a greater number of stations, and, in the words of the court below, "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

Pending a further study of the feasibility of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, *on a case-to-case basis*, whether the deletion of VHF channels in predominantly UHF areas (and the substitution of UHF channels therefor) would improve "the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1582).[1]

App. D.C. 414, 231 F.2d 748 (1956); *Van Curler Broadcasting Co.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957). Following the release of its *Second Report on Deintermixture* (June 26, 1956), the Commission *did* refuse to finalize VHF grants in the 13 areas where deintermixture proceedings were instituted (see Nos. 235 and 242, Oct. Term, 1958). During this interval (from November 10, 1955 to June 26, 1956) Channel 3 in Madison was granted to respondent Radio Wisconsin, Inc. (10 RR 1224).

[1] Commissioner Doerfer dissented from the interim deintermixture conclusions thus reached by the Commission in its *Second Report on Deintermixture* (13 RR 1571, 1594-1595), on the premise that the "equitable" distribution provisions of the Communications Act (47 U.S.C. Sec. 307(b)) required the Commission to allocate VHF as well as UHF channels to major markets, and thus foreclosed the Commission from making certain markets all-UHF and others all-VHF. Commissioner Mack likewise disagreed with the "interim" portion of the *Second Report on Deintermixture* (13 RR 1571, 1593).

To that end, on June 26, 1956 (concurrently with the release of its *Second Report on Deintermixture*), the Commission instituted some 13 proceedings to deintermix particular markets, including a proposal to deintermix Madison by reserving VHF Channel 3 for educational use and substituting a UHF channel therefor (R. 1-2).[1] Commissioners McConnaughey, Doerfer, and Mack dissented therefrom (R. 2). At petitioner's request the proceeding was broadened to include the deintermixture of both Madison and Rockford—by making Madison all-UHF and Rockford all-VHF, or alternatively by making both markets all-UHF (R. 69-77, 106-107, 388).[2]

Petitioner submitted voluminous data on December 3, 1956, showing that such shifts would not result in any substantial "white area" (R. 405-406, 415-416). It was further shown that this so-called "white area" (some 50 miles to the north and west of Madison) does in fact receive acceptable television service, as disclosed by the large number of sets in use in the area prior to the time WISC-TV (licensed to respondent Radio Wisconsin, Inc.) commenced operating on Channel 3 in June of 1956 (R. 394, 420-429).

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[1] In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's *Second Report on Deintermixture* and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets. Senate Rep't No. 2769, 84th Cong., 3d sess. (excerpted at R. 520-526).

[2] More specifically, petitioner supported (1) the Commission's proposal to preclude the use of Channel 3 "for commercial purposes" in Madison, (2) its own counterproposal to assign Channel 3 to Rockford and substitute Channel 39 therefor in Madison, and (3) an alternative proposal that Rockford be deintermixed by deleting Channel 13 and substituting a UHF channel therefor (R. 388).

Petitioner likewise showed that, except for the city of Rockford itself, substantial portions of the area served by Winnebago (UHF Station WTVO) are predominantly VHF in character—to the northeast by reason of three VHF stations in Milwaukee, to the southeast by reason of three VHF stations in Chicago, to the southwest by reason of two VHF stations in *Rock Island-Davenport-Moline*,[1] and to the northwest by WISC-TV in Madison, which (if the channel remained there) would blanket all of Winnebago's service area to the northwest including the city of Rockford (R. 395-414). It was further pointed out that by reason of these multiple VHF signals, and the shortage of all-channel receivers in outlying areas, that Winnebago's continued operation on UHF (with WISC-TV placing a Grade B signal over Rockford) was highly problematical (R. 397, 430-433, 639-649). It was accordingly urged, in order to assure Rockford of a second competitive service and Madison of at least three competitive services, that VHF Channel 3 should be allocated to the Rockford area.

In its answering comments of December 28, 1956, Radio Wisconsin, Inc. made much of the fact that if Channel 3 were shifted to the Rockford area (Orangeville)[2] it would still provide a strong Grade B (and might even be so located as to provide a Grade A) signal into Madison—thereby arguing that Madison would not be "deintermixed" (R. 567-568).

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[1] In the proceeding to deintermix *Peoria*, progressing concurrently with that in Madison-Rockford, it was proposed to shift Channel 8 from Peoria to Rock Island-Davenport-Moline, thus making three VHF channels in that market (see No. 242, Oct. Term, 1958).

[2] In order to meet mileage separation requirements (transmitter to transmitter) it was necessary, in the event Channel 3 was shifted from Madison to Rockford, to place the transmitter in the vicinity of Orangeville, Wisconsin—from which location the requisite city-grade signal could be placed over Rockford (R. 413).

Winnebago tendered supplemental data (R. 769-791) showing that if Station WCIA on Channel 3 in Champaign, Illinois shifted its transmitter site to the south, Channel 3 could be utilized south and west of Rockford (at a distance of 60-70 miles from Madison), from whence it would place little or no signal in Madison but nevertheless provide a city-grade service to Rockford. Winnebago offered to pay the expenses of such a move by Station WCIA. It was further pointed out that such a shift in WCIA's transmitter location would improve the UHF picture in Peoria and Bloomington, Illinois (R. 776) and that a shift of Channel 3 from Madison to Rockford *would compensate the state of Illinois for the loss of a VHF channel it would suffer in the contemplated move of Channel 2 from Springfield, Ill. to St. Louis, Mo.* (R. 777-778).[1] It was further urged that if Channel 3 were used in the Orangeville area its signal could be suppressed in the direction toward Madison by directional means and concentrated toward Rockford, thereby obviating any intermixture problems in Madison (R. 776, 787-790).

By Report and Order adopted February 26 and released March 1, 1957, the Commission (by a 4-3 vote) refused to modify its 1952 allocations in the Rockford-Madison area (R. 792-802). Although rejecting Winnebago's supplemental pleadings as untimely (R. 798, para. 16), it nevertheless placed much stress on the fact that if Channel 3 were shifted to Rockford it would continue to infiltrate the Madison area from Orangeville (R. 797, para. 13).

In a Petition for Reconsideration filed April 1, 1957 Winnebago highlighted the inconsistencies, referred to by

[1] These proceedings pertaining to Springfield and Peoria, like the instant proceeding for Madison-Rockford, were among the 13 which the Commission instituted on June 26, 1956, concurrently with its *Second Report on Deintermixture* (see Nos. 235 and 242, Oct. Term 1958).

the dissenting Commissioners (R. 799-802), between the Commission's action in Madison and its actions *of the same day* deintermixing Peoria, Springfield, Evansville, Fresno, Elmira, and Schenectady (R. 816-830). If re-emphasized the "public interest" aspects of its supplemental pleadings which the Commission had rejected as untimely (R. 816-830). By Memorandum Opinion and Order released June 24 the Commission by the same 4-3 vote denied the aforesaid Petition (R. 864-873). These actions of the Commission were the subject matter of an Appeal and Petition for Review duly filed in the court below (under 47 U.S.C. Secs. 402(a) and (b)). That court affirmed *per curiam*, relying primarily on its decisions a few weeks earlier in two deintermixture appeals from other March 1, 1957 actions of the Commission (Peoria and Hartford).

REASONS FOR ALLOWANCE OF THE WRIT

1. *The Decision Below Is in Conflict with this Court's Decision in the Chenery Case.*—In each of the eight deintermixture proceedings decided March 1, 1958 (Peoria, Springfield, Evansville, Fresno, Elmira, Schenectady, Hartford and Madison),[1] Commissioners Hyde, Lee and Bartley voted to deintermix, by removing a VHF allocation from an area which was otherwise predominantly UHF, in line with the *Second Report on Deintermixture* and the Senate Committee's endorsement thereof. In each instance, Commissioners Doerfer and Mack voted not to deintermix. Commissioner Doerfer on the ground (contrary to subsequent decisions of the court below)[2] that Section 307(b) foreclosed the Commission from de-

[1] See 22 FCC 293-395 (1957).

[2] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235); *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C., 1958), vacated by this Court on other grounds October 20, 1958 (No. 242).

leting wide-coverage VHF channels from major markets to which they were allocated in 1952 (13 RR 1571, 1594; 22 FCC 376, 378-379 and fn. 15), and Commissioner Mack apparently because of his opposition to "piecemeal" deintermixture (13 RR 1571, 1593).

Although the 13 proceedings instituted June 26, 1957, as a result of the Second Report on Deintermixture, were designed to determine on a case-to-case basis whether deintermixture would or would not improve the opportunities for more effective competition among a greater number of stations (in line with 47 U.S.C. Sec. 303(g)), it is apparent from Commissioner Doerfer's dissent in Fresno (22 FCC 376, 378-379), which he made applicable to each of the other cases were deintermixture was ordered (22 FCC 376, fn. 15), that he cast his vote in each of these deintermixture cases on the erroneous *legal* premise (regardless of the particular facts of record in a given proceeding) that the Commission lacked authority (by reason of 47 U.S.C. Sec. 307(b)) to delete the one and only VHF channel allocated to that market and to substitute UHF channels therefor.

Since a key vote (Commissioner Doerfer) against deintermixing Madison and Rockford was predicated on an erroneous legal premise,[1] the decision below affirming the Commission's 4-3 action refusing to deintermix Madison-Rockford ignored the salutary doctrine, frequently enunciated by this Court, that the validity of agency action must be determined on the grounds on which the agency itself places its decision and not on some different ground, however cogent. *Securities and Exchange Com.*

[1] The petitioner in *Sangamon Valley Television Corp.* v. *United States* re-echoed Commissioner Doerfer's views regarding 47 U.S.C. Sec. 307(b), which the court below expressly rejected (255 F.2d 191). Although this Court has since vacated that judgment on other grounds (No. 235, Oct. Term, 1958), we do not construe that action as casting doubt on that phase of the lower court's decision.

v. *Chenery Corp.*, 318 U.S. 80, 87-88. How Commissioner Doerfer, and perhaps Commissioner Mack, would have voted had they decided the Madison-Rockford case on the *facts of record*, uninfluenced by the *erroneous* belief that they were precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from removing Channel 3 from Madison, a court can only speculate. In such situations, under the *Chenery* doctrine, the case should be remanded to the administrative agency. Because of the impact on petitioner, of retaining Channel 3 in Madison, petitioner was entitled to a decision predicated *on the facts developed* on the record, and not one resulting from a mistaken interpretation of the requirements laid down by Congress in 47 U.S.C. Sec. 307(b).

2. *The Decision Below Contravenes Congressional Policies Embodied in the Communications Act.*—The Commission is under a mandate to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)) and "to provide a fair, efficient, and equitable distribution of radio service" among the several states and communities. Whether the basic policies thus set forth in these key provisions of the governing statute are or are not being effectuated by an administrative agency is a proper matter for judicial scrutiny. Unless the agency states the reasons for its actions with sufficient precision and logic to enable the courts to determine whether the challenged action is or is not in furtherance of expressed Congressional policy, the matter should be remanded to the agency for further proceedings. *Schaffer Transportation Co. v. United States*, 355 U.S. ——.

Here, the Commission did not consider (R. 792-802) what the impact of the Channel 3 operation in Madison would be on petitioner's UHF operation in Rockford, Ill. It failed to explain why the retention of Channel 3 in Madison would not adversely affect the number of com-

petitive services which Madison and Rockford would otherwise have. It gave no consideration, as a *different* majority did in Elmira and Vail Mills, to the advisability of not utilizing Channel 3 in either Madison or Rockford. It gave no consideration to petitioner's proposal that even if Channel 3 were kept in Madison, Rockford should be made all-UHF. The majority's "reasoning" (as evidenced by the dissents of Commissioners Hyde, Lee, and Bartley) is completely at loggerheads with the *Peoria* and *Springfield* decisions released the same day (in which Hyde, Lee and Bartley helped constitute the majority, and in which deintermixture was ordered).[1]

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[1] The action in Madison (where four Commissioners refused to deintermix that market) cannot be harmonized with the action in six other cases decided the same day (where different majorities reached diametrically opposite conclusions):

(a) It cannot be explained by a desire on the part of the majority of the Commission to retain the VHF channels in the states to which they were originally assigned by the Sixth Report, because in three cases—Springfield, Peoria, and Evansville—VHF channels allocated to one state by the Sixth Report were shifted to another state or states by the actions of March 1, 1957. 22 FCC 318; 22 FCC 342; 22 FCC 382. In fact, in the Sixth Report the Commission had allocated to Illinois, with a substantially larger population than either Missouri or Wisconsin, fewer VHF channels than to either of those states (approximately at the ratio of 1:4). Having shifted on March 1, 1957 Channel 8 from Peoria to Rock Island-Moline (Ill.)-Davenport (Ia.), and Channel 2 from *Springfield* to St. Louis, Mo., the Madison-Rockford proceeding afforded the Commission an excellent opportunity to rectify in some degree the deficiency in VHF allocations thus suffered by Illinois.

(b) It cannot be harmonized on any theory of not permitting scarce VHF channels to go unused, because in two instances, Channel 10 in Vail Mills and Channel 9 in Elmira, the VHF channel was placed "on ice" and not allocated elsewhere in order to foster the development of UHF facilities. 22 FCC 293; 22 FCC 307; cf. 15 RR 1682 (1957).

(c) It cannot be justified on any "white area" concept because Radio Wisconsin's evidence on this score was no more persuasive than comparable evidence adduced in the six proceedings where deintermixture was ordered. The fact that the UHF stations in Madison, with the elimination of the lethal threat of competition

Petitioner is a licensee of the Commission, with limited property rights in the facilities by which it is providing a UHF service to Rockford. *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948). In its *Second Report on Deintermixture* the Commission recognized that the intermixture of VHF and UHF stations in the same markets

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from Channel 3, would augment their power and provide satellite service (a factor considered in Peoria and Springfield) (Nos. 235 and 242, Oct. Term 1958), was ignored by the Commission in paragraph 14 of its conclusions in Madison (R. 797), as was the showing made by petitioner that so-called "white area" was in fact receiving service from other stations in Wisconsin even before Channel 3 got on the air (R. 420-429).

(d) It cannot be explained on terrain factors because in Elmira, Vail Mills, and the Berkshire Mountains of western Massachusetts, the terrain is recognizedly less favorable to UHF propogation than in the Madison area (22 FCC 293; 22 FCC 307).

(e) It cannot be rationalized on any theory that the area in question will not support an adequate number of UHF operations to provide competitive service, because (except for the Connecticut Valley) the Madison-Rockford area has more existing UHF operations than any other area involved in the various deintermixture proceedings decided March 1, 1957 (see R. 434-447).

(f) It cannot be explained on any dislocation concept because in Evansville, Fresno, and Schenectady the Commission proposed to shift *existing* VHF operations. 22 FCC 382; 22 FCC 365; 22 FCC 293. In according WISC-TV "credit" for existing coverage, the Commission conveniently overlooked assurances given UHF operators in its November 10, 1955 Reports and Orders and subsequent assurances given the court below (in defending such actions) that VHF grants made while Docket No. 11532 was being resolved would not subsequently be used as an "excuse" for not deintermixing areas which were then exclusively UHF.

(g) It cannot be justified on the ground of penetration into the Madison area of VHF signals from outside stations, because in each of the markets which the Commission did deintermix a not dissimilar situation existed (for example, Champaign's penetration of Springfield, Davenport-Rock Island-Moline's penetration of *Peoria*, etc.). Furthermore, such an "excuse" ignored the Commission's authority to minimize such penetration by the Rockford stations (if that market was made all-VHF) by requiring them to directionalize or to deny transmitter locations "unnecessarily close" to Madison (in line with action promised in Peoria), and took no account of petitioner's alternative proposal that Rockford

was a mistake, and that UHF stations could not compete in areas served by two VHF stations (Channel 13 in Rockford and Channel 3 in Madison).[1] The Commission instituted proceedings to rectify that mistake in the Madison area (Docket No. 11754). The utilization of Channel 3 in Madison, since it will mean fewer UHF receivers in that area, will reduce petitioner's coverage in and around Rockford just as detrimentally as would a grant which creates electronic interference. *Federal Communications Commission* v. *National Broadcasting Company*, 319 U.S. 239.

Because of the direct impact which the retention of Channel 3 in Madison will have on existing UHF service in the Madison-Rockford area, petitioner was entitled to

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be made all-UHF, by deleting Channel 13 and substituting a UHF channel therefor.

(h) It cannot be explained on the premise that the educational station in Madison was already operating on UHF and that the Wisconsin legislature had not appropriated funds to shift the operation to VHF. WHA-TV still preferred the VHF assignment (see R. 793) and did not object to shifting to Channel 3 if funds could be procured to cover the expense involved. In scores of cases the Commission has continued educational reservations where the legislatures have not yet appropriated the necessary funds. In any event, such reasoning does not dispose of another alternative before the Commission of allowing WHA-TV to remain on Channel 21, of placing Channel 3 "on ice", and of shifting Channel 39 from Rockford to Madison for WISC-TV.

[1] "Our experience in other markets convinces us that the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area." 22 FCC 293, 302 (para. 19): Cf. Commission's brief in the court below in *WIRL Television Company* v. *United States* (Br. p. 3): "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by *one* VHF VHF station proposed in 1952 is likely *to seriously jeopardize* the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also *Channel Assignment to Columbia, S. C.*, 15 RR 1682, 1688 (1957).

a due process determination whether the use of Channel 3 in Madison would serve the public interest, i.e., a decision correctly setting forth the basic facts, with rational and logical conclusions drawn therefrom. That right cannot be destroyed by labeling the proceeding as "rule-making" rather than "adjudicatory," where the impact of the proposed "rule" is "particular and immediate" rather than "general and future." *Philadelphia Co.* v. *Securities and Exchange Com'n*, 84 U.S. App. D.C. 73, 81, 175 F. 2d 808 (1948), dismissed as moot 337 U.S. 901. Where agency action "necessarily affects existing rights, . . . whether by the one form of action or the other, the ordinary distinction between 'quasi-legislative' and 'quasi-judicial' action gives way before the elementary requirement that right be not destroyed or impaired without hearing." *National Broadcasting Co.* v. *Federal Communications Commission*, 76 U.S. App. 238, 248, 132 F.2d 545 (per Rutledge, J.), aff'd on other grounds 319 U.S. 239; *Philadelphia Co.* v. *Securities & Exchange Com'n*, 84 U.S. App. D.C. 73, 175 F.2d 808, dismissed as moot, 337 U.S. 901; *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 46, 175 F.2d 351; see Davis, "Requirement of a Trial-Type Hearing," 70 *Harvard Law Review* 193-280 (1956).

Absent a decision which contains basic findings with rational conclusions drawn therefrom, it is not possible for a reviewing court to determine whether the agency has or has not given effect to congressional policies embodied in the governing statute, and whether the agency has or has not impaired petitioner's rights in an arbitrary and capricious fashion. In such situations the matter should be remanded to the agency so that it may at least set forth with more precision the basis of its decision. *Schaffer Transportation Co.* v. *United States*, 355 U.S.

3. The Decision Below Raises Important Questions Which Have Not Been but Which Should be Resolved by this Court.—On its own motion, concurrently with the release on June 26, 1956, of its *Second Report on Deintermixture,* the Commission instituted proceedings with a view to deintermixing 13 markets, and in that way rectifying to the degree possible the mistaken "intermixture" principle embodied in its 1952 allocation table. The Commission made it clear that requests to deintermix other markets would be considered in due course (13 RR 1571, 1584, para. 37).

On March 1, 1957, as a result of these "pilot" proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in the following eight general areas—Albany-Schenectady-Troy-Vail Mills, N. Y. (22 FCC 293); Elmira, N. Y. (22 FCC 307); Springfield, Ill.-St. Louis, Mo.-Terre Haute, Ind. (22 FCC 318); Hartford, Conn.-Providence, R. I. (22 FCC 332); Peoria, Ill.-Rock Island-Davenport-Moline, Ill.-Iowa (22 FCC 342); Madison, Wisc.-Rockford, Ill. (22 FCC 356); Fresno-Bakersfield-Santa Barbara, Cal. (22 FCC 365); and Evansville-Hatfield, Ind.-Owensboro, Louisville, Ky. (22 FCC 382).

Five of these cases have since been separately appealed to the court below, with the Commission's actions deintermixing or refusing to deintermix affirmed in each of the four cases thus far decided (Peoria, Springfield, Hartford and Madison).[1] The fifth is awaiting decision. Other deintermixture proceedings decided March 1, 1957

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[1] *WIBL Television Co.* v. *United States,* 253 F. 2d 863 (U. S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 242, Oct. Term 1958); *Sangamon Valley Television Corp.* v. *United States,* 255 F. 2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235, Oct. Term, 1958); *Springfield Television Broadcasting Corp.* v. *United States,* —— F. 2d —— (U. S. App. D.C. 1958); and *Winnebago Television Corp.* v. *United States,* 258 F. 2d 163 (U. S. App. D.C. 1958).

by the Commission (e.g., Fresno and Evansville) are awaiting "show cause" hearings under 47 U.S.C. Sec. 316 before they can be finalized by the Commission and reviewed by the courts. Requests to deintermix other areas have since been decided and numerous petitions to deintermix still other markets are awaiting action by the Commission.[1]

In short, a substantial volume of the Commission's current workload relates to proposals to improve the 1952 television allocation table by making some markets all-UHF and others all-VHF—in an effort to provide more effective competition among a greater number of stations, thereby preserving for future use the 70 UHF channels essential to a truly nationwide competitive television system.[2]

In each of these deintermixture proceedings, because this Court has not yet spoken on these matters, substantial portions of the comments filed by interested parties deal with the question of the Commission's authority to take the action it proposes (cf. R. 3-68, 152-200, 528-535) with diametrically opposite views expressed on the scope and limitations of Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307(b)), and on the need for adjudicatory hearings under Sections 303(f) and 316 of the Communications Act (47 U.S.C. Secs. 303(f) and 316), especially where the impact of a so-called "rule-making" proceeding is "particular and immediate" rather than "general and future." See *Phila-*

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[1] E.g., *Channel Assignment to Columbia, S. C.*, 15 RR 1682 (1957); *Walla Walla Deintermixture Case*, 16 RR 1636 (1958); *Channel Assignments in Pittsburgh, Pa.*, 16 RR 1558 (1957); see 22 Fed. Reg. 2050, 3127, 3185, 4365, 5613.

[2] "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture*, 13 RR 1571, para. 12 (1956).

delphia Co. v. Securities and Exchange Com'n, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949).

With individual members of the Commission themselves in disagreement over the scope and limitations of 303(g) and 307(b), as evidenced by Commissioners Hyde, Lee and Bartley voting to deintermix and with Commissioner (now Chairman) Doerfer taking the position that he is precluded, as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from deleting a VHF channel in a major market (13 RR 1571, 1954; 22 FCC 378-379), the matter of the Commission's legal authority in this field is one of general importance to the broadcast industry. The Commission's precise authority on this score thus presents important and recurring questions which have not yet been but which should be decided by this Court.

Since all appeals from Commission action under Section 402(b) of the Communications Act (47 U.S.C. Sec. 402(b)) must be brought, and since most appeals under Section 402(a) of that Act (47 U.S.C. Sec. 402(a)) are brought, in the court below, the occasion for a conflict of circuits will be rare.[1] With the future course of television broadcasting (whether on VHF alone, on UHF alone, or on an intermixed or a deintermixed basis) at issue, the question of the Commission's authority to deintermix or not to deintermix given markets, and the extent to which its actions in this field are limited by Sections 303(f), 307(b) and 316 of the Communications Act (47 U.S.C. Secs. 303(f), 307(b) and 316) is a matter of sufficient and recurring public importance to merit consideration by this Court.

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[1] Since 1956 the court below has decided on the merits no fewer than nine deintermixture appeals (see cases cited in fn. 3 p. 5 and fn. 2 p. 10), in each instance affirming vacillating results reached by the Commission. No such cases have been decided on the merits in any of the other circuits.

4. *The Decision Below Should in any Event Be Vacated.*—As heretofore noted, the Commission on June 26, 1956, pursuant to its Second Deintermixture Report, instituted deintermixture proceedings in 13 critical television areas. On March 1, 1957, decisions were reached in eight of those proceedings (including Peoria, Springfield, and Madison). Four have been heard and affirmed by the court below. However, two decisions of the court below were vacated by this Court on October 20, 1958 because of alleged *ex parte* presentations to individual Commissioners in the Springfield proceeding and the interrelationship between the proceedings in Peoria and Springfield (Nos. 235 and 242, Oct. Term 1958). In the instant appeal, the court below relied on its decision in *Peoria* which this Court has since vacated.

The above-mentioned deintermixture decisions all stem from the Commission's *Second Report on Deintermixture*; they were considered by the Commission together, with each of these decisions announced the same day (March 1, 1957). Whether Channel 3 should be shifted from Wisconsin to Illinois should turn in part on whether Channels 2 and 8 (heretofore allocated to Springfield and Peoria) are or are not shifted to other states. The cases are thus closely interrelated factually, geographically and legally.

With charges of *ex parte* presentations pending in at least one of the proceedings, on which the court below relied for affirmance of the Commission's action in Madison,[1] and with the vote of resigned member Commissioner

[1] It is the Commission's position that it is not limited in the discharge of its quasi-legislative responsibilities, as in cases of adjudication, to "matters presented on the record." See Commission response of October 30, 1958, in *Owensboro on the Air* v. *Federal Communications Commission*, Case No. 13,776 et al (U.S. App. D.C.); see Brief in Opposition, *Van Curler Broadcasting Corp.* v. *United States* (No. 489, Oct. Term 1956). The record certified by the Commission to the court below in the instant proceeding is restricted to formal pleadings.

Mack necessary to the result reached by the majority in Madison-Rockford case, certiorari should be granted, the decision below should be vacated, and the case remanded for appropriate further proceedings (as in Nos. 235 and 242)—so that the various interrelated deintermixture cases heretofore decided by different majorities of the Commission can be resolved with some degree of logic and consistency.

WHEREFORE, it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

By JAMES A. McKENNA, JR.
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Of Counsel:
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November 14, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14086.

WINNEBAGO TELEVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

RADIO WISCONSIN, INC., AND
GREATER ROCKFORD TELEVISION, INC., INTERVENORS.

On Petition for Review of Orders
of the Federal Communications Commission

Decided July 2, 1958

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, were on the brief, for petitioner.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, *John J. O'Malley, Jr.*, Counsel, Federal Communications Commission, and *Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for respondents.

Mr. Arthur W. Scharfeld, with whom *Mr. Arthur Stambler* was on the brief, for intervenor Radio Wisconsin, Inc.

Mr. Stanley S. Neustadt for intervenor Greater Rockford Television, Inc. *Messrs. Marcus Cohn* and *Paul*

Dobin were on the brief for intervenor, Greater Rockford Television, Inc.

Before WILBUR K. MILLER, WASHINGTON and BURGER, *Circuit Judges.*

PER CURIAM: Petitioner Winnebago, operator of a UHF station at Rockford, Illinois, seeks review of an order of the Federal Communications Commission denying, after a rule-making proceeding, proposals to amend channel assignments in Madison, Wisconsin, and Rockford. After consideration of the record in light of petitioner's contentions, we find no basis for disturbing the Commission's action. *Cf. Coastal Bend Telev. Co.* v. *F.C.C.*, 98 U.S.App.D.C. 251, 234 F.2d 686 (1956); *WIRL Telev. Co.* v. *F.C.C.*, — U.S.App.D.C. —, 253 F.2d 863 (1958); *Springfield Telev. Broadcasting Corp.* v. *F.C.C.*, — U.S.App.D.C. —, — F.2d — (June 19, 1958).

Affirmed.